Supreme Court, U.S.
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No. 96-233

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DR. PATRICK J. ROHAN,
Petitioner,

v.

THE AMERICAN BAR ASSOCIATION, CLAUDE R. SOWLE, JAMES P. WHITE, R. WILLIAM IDE III, BARBARA B. LEWIS, PHILIP D. SHELTON, GEORGE S. GROSSMAN, and BRADLEY J.B. TOBEN,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

DARRYL L. DEPRIEST
General Counsel
AMERICAN BAR ASSOCIATION
541 North Fairbanks Court
14th Floor
Chicago, IL 60611
(312) 988-5000

DAVID T. PRITIKIN *
CONSTANTINE L. TRELA, JR.
DAVID R. STEWART
JEFFREY H. DEAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7000

Counsel for Respondents

* Counsel of Record

September 13, 1996

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QUESTION PRESENTED

Whether the courts below properly held that respondents were entitled to summary judgment dismissing petitioner's claim under 42 U.S.C. § 1983 where (1) petitioner failed to demonstrate a nexus between the alleged exercise of state power and his alleged injuries, (2) petitioner was not deprived of any property interest as a matter of state law, (3) the alleged injuries to petitioner's reputation do not implicate a liberty interest, and (4) petitioner voluntarily relinquished his alleged property and liberty interests in any event?

LIST OF PARTIES AND AFFILIATES

The caption of the case in this Court contains the names of all the parties to the proceeding in the district court and in the court of appeals. Respondent American Bar Association is a not-for-profit Illinois corporation. It has no parent or subsidiary companies. The other respondents are all individuals.

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BRIEF IN OPPOSITION

Respondent American Bar Association ("ABA") and respondents Claude R. Sowle, James P. White, R. William Idle III, Barbara B. Lewis, Philip D. Shelton, George S. Grossman, and Bradley J.B. Toben (collectively, the "individual respondents") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by Patrick J. Rohan. The petition should be denied for several reasons: (1) the decision of the court of appeals does not conflict with any decision of this Court or other courts of appeals and, in all events, is entirely correct; (2) the petition rests on mere disagreements with the factual determinations of the lower courts and on the alleged misapplication to those facts of properly stated

rules of law; (3) the petition seeks review of state-law questions as to which both the district court and the court of appeals agree; and (4) the petition rests on allegations of bias by the court of appeals that are baseless and illogical.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Second Circuit is reproduced in Appendix A to the petition. The unreported opinion of the United States District Court for the Eastern District of New York is reproduced in Appendix B to the petition.

JURISDICTION

The district court entered final judgment dismissing petitioner's complaint on June 5, 1995. Petitioner filed a notice of appeal on June 21, 1995. The Second Circuit affirmed the judgment of the district court on February 21, 1996. Petitioner filed a petition for rehearing and for rehearing *en banc* on March 6, 1996. The Second Circuit denied the petition on May 14, 1996. This Court has jurisdiction over the instant petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in its entirety:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, sec. 1.

Section 1983 of Title 42 of the United States Code provides in its entirety:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

Article 1, Section 6, paragraph 3 of the New York Constitution provides in its entirety:

> No person shall be deprived of life, liberty or property without due process of law.

New York Const., art. 1, sec. 6, para. 3.

COUNTERSTATEMENT OF THE CASE

This action arises under the federal civil rights statute, 42 U.S.C. § 1983, and the Constitution and laws of the State of New York. Petitioner Rohan was the Dean of St. John's University School of Law ("St. John's") until his resignation as Dean on August 27, 1990. Petitioner complains that the ABA, during a March 1990 site evaluation visit to St. John's in connection with the ABA law school accreditation program, reported unjustified (but not untrue) criticisms of petitioner that had been expressed by St. John's faculty and students, that the ABA failed to provide petitioner with an adequate opportunity to respond to a written report noting those criticisms, and that the ABA failed to protect the report's confidentiality, all in alleged violation of internal ABA

policies and procedures. Petitioner claims that the acts of respondents interfered with his position as Dean (by making it necessary for him to resign) and caused him injury to his reputation and other economic harm without due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article 1, Section 6 of the New York Constitution, and in violation of the New York common law of negligence, promissory estoppel, and tortious interference with contract.

1. The ABA is a private, not-for-profit Illinois corporation. (J.A. 80.)[1] For seventy years, the ABA has maintained a set of standards for the approval of law schools ("ABA Standards") and has published a list of law schools that comply with those Standards. (*Id.*) The ABA accreditation program is funded exclusively by the ABA and by fees paid by participating law schools. (J.A. 84.) Law schools voluntarily apply for ABA accreditation; the ABA cannot compel a law school to undergo review by the ABA. (*Id.*) No state agency has the power to appoint members of any ABA committee, much less to determine the content of the ABA Standards or whether a particular law school complies with the Standards. (J.A. 81, 84.) In a number of states, graduation from an ABA-approved law school is an independent (but not necessarily exclusive) means of satisfying the legal education requirement for admission to the bar.[2] (J.A. 83, 1154-58.) The states, however, at all times maintain exclusive

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[1] Citations to the Joint Appendix filed in the court of appeals are provided as "J.A. ——." Citations to the appendix to the petition for a writ of certiorari are provided as "A. ——."

[2] In New York, for example, an applicant for admission to the bar may satisfy the legal education requirement by any one of the following methods: (1) graduation from a law school approved by the ABA, the New York Court of Appeals, the Association of American Law Schools, or the New York State Department of Education; (2) law office study and attendance at an approved law school for one year; or (3) law study in a foreign country. N.Y. Ct. App. R. §§ 520.1-520.6.

authority over bar admissions.[3] (J.A. 83-84, 1146-49.) Neither the ABA nor the states exercise any power over the personnel decisions of private law schools. (J.A. 84.)

2. St. John's is a private law school that has been accredited by the ABA since 1937. (J.A. 84, 785.) In March 1990, a team of ABA volunteers, appointed by respondent White, conducted a site evaluation of St. John's. (J.A. 84.)[4] Prior to the site evaluation, respondent White and the site evaluation team members received a flurry of communications from St. John's faculty, students and alumni criticizing petitioner, including a 60-page report entitled "The Law School at St. John's: A Statement of Some Faculty Concerns," which was endorsed by 22 of 34 tenured St. John's faculty members. (J.A. 35-37, 87, 101, 112-13, 919-82, 1007-09.)

At the conclusion of the site visit, the team (with the exception of respondent Lewis) met with the President of St. John's University ("University"). (J.A. 113-14.) At no point during that meeting (or afterwards) did any team member suggest that petitioner resign as Dean, much less condition ABA approval of St. John's on petitioner's removal. (J.A. 113-14.)

On August 27, 1990, petitioner resigned as Dean, effective February 1, 1991.[5] Petitioner retained his position as

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[3] For example, the New York Court of Appeals may, in its discretion, waive any provision of its bar admission rules, including the legal education requirement, upon a proper petition by an applicant. *See* N.Y. Ct. App. R. § 520.14.

[4] Respondent White serves as the Consultant on Legal Education to the ABA and administers the ABA law school accreditation program. (J.A. 79.) The remaining individual respondents were members of the site evaluation team. (J.A. 84-87, 112.)

[5] Petitioner's letter of resignation, sent to the President of the University, provides in pertinent part:

> In your letter granting my long delayed Research Leave, you urged me not to make a decision about staying on as Dean until I returned in September of 1991. However, I have given

a tenured member of St. John's faculty. In connection with his resignation as Dean, petitioner entered into a written agreement with the University which guaranteed that he would receive the highest salary of any member of St. John's faculty, as well as a host of other fringe benefits; regulated the manner in which his resignation would be handled by the University; and released the parties from any claims they may have had against each other. (J.A. 1292-1301.)

On September 10, 1990—*after* petitioner resigned as Dean and *after* he entered into the agreement with the University—the ABA transmitted to St. John's and to petitioner a written report of the site team's visit to the law school. (J.A. 88.) Petitioner complained that this report was disparaging to him and submitted four separate written responses to it, each of which was considered by the ABA Accreditation Committee. (*Id.*) Nevertheless, petitioner asserts that he was not afforded an adequate opportunity to respond to the site evaluation report. (J.A. 65-66.)

Based on its consideration of these and other materials, the ABA affirmed St. John's status as an ABA-accredited law school. (J.A. 88-89.) In so doing, the ABA made no findings or conclusions referring to petitioner (J.A. 100-08), except to note that he had resigned (J.A. 101).

3. The district court dismissed petitioner's section 1983 claim on three independent grounds: (1) respondents, in expressing their private views about the quality of law schools (and in reporting the criticisms of others about

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> the matter much thought, from the perspective of my family's well being and from that of the Law School's future. I have concluded that both constituencies will be best served if I stepped down from administrative duties on February 1, 1991. On that date, I will have completed ten years in the Dean's office and thirty four years on the Faculty. My Deanship has lasted three times the norm for Law School Deans, and it's time for a new Dean to bring fresh insights to the post.

(J.A. 93.)

particular law school employees), do not act "under color of" state law (A. 13-19); (2) petitioner was an employee at-will and possessed neither a property nor a liberty interest in connection with his position as Dean (A. 20); and (3) because petitioner either voluntarily resigned his position or was terminated by the University, respondents did not in any event cause petitioner's alleged injuries (A. 21). The district court dismissed petitioner's state constitutional and common law claims for reasons that do not raise a federal question. (A. 22-25.)

The court of appeals unanimously affirmed. The court affirmed the dismissal of petitioner's section 1983 claim on the grounds that (1) even assuming the ABA exercises delegated state power over bar admissions, there is no nexus between the ABA's alleged power over bar admissions and petitioner's alleged employment-related and reputational injuries (A. 3-4), that (2) in any event, petitioner failed to come forward with any competent evidence that respondents were responsible for petitioner's resignation (A. 4), that (3) petitioner was an employee at-will and thus had no protectible interest in his position as Dean (*id.*), and that (4) the alleged injuries to petitioner's reputation do not implicate a liberty interest (A. 5). The court affirmed the dismissal of petitioner's state law claims for the reasons stated by the district court. (*Id.*)

REASONS FOR DENYING THE WRIT

1. The decision of the court of appeals does not conflict with any decisions of this Court or any other court of appeals and is, in all events, entirely correct.

a. In affirming the dismissal of petitioner's section 1983 claim, the court of appeals held that there was no connection, much less a close "nexus," between petitioner's alleged employment-related and reputational injuries and the ABA's alleged power over bar admissions and law school accreditation. In so doing, the court of appeals correctly stated and correctly applied the law. This Court

has long held that a section 1983 plaintiff must demonstrate a "sufficiently close nexus between the State and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). *See also Rendell-Baker v. Kohn*, 457 U.S. 830, 841-42 (1982).

Here, the ABA's alleged power over bar admissions and law school accreditation did not affect petitioner. Petitioner was not denied admission to the bar, and St. John's accreditation was not revoked. Petitioner complains only that he was somehow forced to resign his position at a *private* law school as a result of *private* criticisms reported to his employer by *private* volunteers of a *private* entity. Whatever the relationship between the ABA and the states with regard to bar admissions, that relationship is wholly unrelated to petitioner's alleged employment-related and reputational injuries. There is simply no nexus whatsover, much less the close one required under section 1983, between the state power alleged to be at issue in this case and the private action of which petitioner complains. The court of appeals was entirely correct in holding that the "conduct of which Rohan complains (*i.e.*, interference with his employment relationship and injury to his reputation) is essentially incidental to the accreditation process and the nexus between that process and state bar admissions." (A. 3.)[6]

b. Independent and apart from the state action issue, the court of appeals held that petitioner had no protectible

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[6] As the court of appeals noted, the only arguable way in which the ABA's alleged power over bar admissions could have affected petitioner would have been if the ABA had conditioned the approval of St. John's on petitioner's termination. (A. 3.) The court of appeals, however, found no support in the record for such a result. (A. 3-4.) The court of appeals did not err in affirming summary judgment where, as here, petitioner failed to raise facts supporting the only conceivable basis for his claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-57 (1986).

property interest in his position as Dean. (A. 4-5.) That holding is in accord with well-settled principles of state and federal law. Petitioner bases his claim to a protectible property interest on oral assurances that he would be able to serve as Dean until his death or retirement. (J.A. 127.) Accepting petitioner's statements as true, he was nevertheless an employee at-will under New York law. *Wright v. Cayan*, 817 F.2d 999, 1002-03 (2d Cir.) (holding that an oral contract for an indefinite term is interpreted as continuous employment at will under New York law), *cert. denied*, 484 U.S. 853 (1987). It is well settled that the Fourteenth Amendment does not protect at-will employment relationships. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also Bishop v. Wood*, 426 U.S. 341, 347 (1976). The court of appeals did not err in applying that rule in this case.[7]

c. Petitioner's claim that he was deprived of a liberty interest as a result of reputational injuries incident to his resignation as Dean is likewise flawed. This Court has held that, absent evidence that the petitioner is foreclosed from virtually *all* opportunity to take advantage of other employment opportunities, *Roth*, 408 U.S. at 573, mere injury to reputation incident to a loss of employment does not implicate a liberty interest. *Siegert v. Gilley*, 500 U.S. 226, 234 (1991); *Paul*, 424 U.S. at 701-12. Petitioner does not even allege that he has been so foreclosed; indeed, he remains a tenured member of St. John's law faculty. Under the circumstances, the court of appeals

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[7] Petitioner's assertion that the court of appeals should have applied federal, rather than state, property law has no legal support. This Court has repeatedly held that there is no federal property law and that, while federal law guarantees certain procedures before a property right may be taken, the Constitution does not create property rights that do not otherwise exist as a matter of state substantive law. *See Roth*, 408 U.S. at 577; *Paul v. Davis*, 424 U.S. 693, 701 (1976); *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 82 (1978); *Bishop*, 426 U.S. at 344; *Perry v. Sinderman*, 408 U.S. 593, 604 (1972) (Burger, C.J., concurring).

was entirely correct in holding that petitioner's alleged injuries do not implicate a liberty interest. (A. 5.)

2. The petition largely rests on mere disagreements with the factual determinations of the lower courts and on the alleged misapplication to those facts of otherwise properly stated rules of law. The lower courts held that the undisputed record evidence demonstrates (1) that plaintiff's decision to resign as Dean was not proximately caused by the acts of respondents, (2) that respondents neither suggested that petitioner resign nor conditioned ABA accreditation on petitioner's removal as Dean, and (3) that the ABA site evaluation report was not transmitted to the University until *after* petitioner resigned. (A. 3-4, 21.) These facts, without more, are sufficient to support the judgments below.

3. The petition also seeks review of a number of questions of state law.

First, the dismissal of petitioner's state constitutional and common law claims raises no federal question, much less an "important" one as contemplated by Supreme Court Rule 10. Petitioner's disagreement with the dismissal of those claims therefore presents no basis for granting the instant petition.

Second, both the district court and the court of appeals held as a matter of New York law that petitioner was an at-will employee and thus had no property interest in his position as Dean. Where, as here, both the district court and the court of appeals agree on a question of state law, this Court has declined to reexamine the state-law question, even where resolution of that question is dispositive of federal claims. *See Bishop v. Wood,* 426 U.S. 341, 346 (1976) (affirming summary judgment dismissing § 1983 claim and declining to reexamine state-law determination that petitioner was an at-will employee); *see also United States v. Durham Lumber Co.,* 363 U.S. 522, 526-27 (1960); *Propper v. Clark,* 337 U.S. 472, 486-89 (1949).

4. Finally, petitioner's allegations that the court of appeals was biased in favor of respondents and abused the mechanism of summary judgment are entirely illogical and lack any factual basis. First, the decision of the court of appeals to affirm the district court's judgment in an unpublished opinion provides no support for petitioner's assertions. In issuing its summary order in this case, the court of appeals acted according to its standard practice in cases in which the decision is unanimous and the panel believes that no jurisprudential purpose would be served by a published opinion. *See* Ct. App. 2d. Cir. R. § 0.23. Second, with regard to the court's decision not to reach the broader issue of the ABA's relationship to the states generally (as opposed to whether that relationship was at all relevant in this case), it is well settled that broad constitutional questions should be avoided where, as here, narrower legal grounds are available to support the judgment. *See, e.g., Jean v. Nelson*, 472 U.S. 846, 854 (1985) ("Prior to reaching any constitutional questions, federal courts must consider nonconstitutional grounds for a decision").[8]

Petitioner's allegations of bias and abuse by the court of appeals are nothing more than mere disagreements with

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[8] The broad constitutional issue in this case does not raise an important federal question in any event. This Court has squarely held that reliance by the states on the recommendations of private bodies does not make the private recommendations "state action," *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982), even where, unlike here, the state expressly delegates to a private body the authority to discipline the state for noncompliance, *NCAA v. Tarkanian*, 488 U.S. 179, 193-96 (1988). The courts of appeals that have applied this rule in the context of accreditation have similarly held that reliance by states on the recommendations of private accrediting associations in granting state licenses does not transform those *private* recommendations into "state action." *See, e.g., Sanjuan v. American Bd. of Psychiatry & Neurology*, 40 F.3d 247, 250 (7th Cir. 1994); *McKeesport Hospital v. Accreditation Council for Grad. Med. Educ.*, 24 F.3d 519, 525-26 (3d Cir. 1994).

the court's decision. Such disagreements do not provide a basis for granting the petition.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

DARRYL L. DEPRIEST
General Counsel
AMERICAN BAR ASSOCIATION
541 North Fairbanks Court
14th Floor
Chicago, IL 60611
(312) 988-5000

DAVID T. PRITIKIN *
CONSTANTINE L. TRELA, JR.
DAVID R. STEWART
JEFFREY H. DEAN
SIDLEY & AUSTIN
One First National Plaza
Chicago, IL 60603
(312) 853-7000

Counsel for Respondents

* Counsel of Record

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